

Siefert (Migration) [2017] AATA 247 (9 February 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Ambra Siefert

CASE NUMBER: 1600154

DIBP REFERENCE(S): CLF2013/61194

MEMBER: Moira Brophy

DATE: 9 February 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations.

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February 2017 at 12:53pm

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Statement made on 09

CATCHWORDS

1. Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Continuing spousal relationship – Information not provided to department – Email address changed – Full evidence in support of relationship available at review

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LEGISLATION

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Migration Act 1958, ss 5F, 65
Migration Regulations 1994, Schedule 2, cl 801.221, r 1.15A

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 7 December 2015 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 14 March 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
7. The delegate refused to grant the visa on 7 December 2015 on the basis that the applicant did not satisfy cl.801.221 because she had not provided requested additional information to the Department. Consequently, the delegate stated that at the time of decision he had no information before him which demonstrated that the applicant continued to be in a spousal relationship with her sponsor.
8. The visa applicant, Ms Ambra Seifert appeared before the Tribunal on 6 February 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Andrew Brown.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.
10. *Background*
11. The applicant was born on 25 September 1985 in Germany and she is a citizen of Italy. She has not declared any previous marriage or defacto relationships. Her parents are residing in Italy and she has one sister residing in Australia.
12. The applicant first came to Australia on a working holiday visa on 4 February 2008. That visa was extended because she worked in Bundaberg and Perth. On 14 March 2013 she lodged an application for a Partner (Temporary)(Class UK) Subclass 820) visa and a Partner (Residence)(Class BS) (Subclass 801) on the grounds of being in a spousal relationship with an Australian citizen Mr Andrew Brown (the sponsor). A temporary visa (Subclass 820) was granted on 15 April 2014.
13. The applicant's sponsor was born in the United Kingdom on 10 June 1980. He originally came to Australia on 7 November 2005 on a working holiday visa. He became an Australian citizen on 23 November 2011. He was previously married to O'Delle Brown in the period from 5 November 2006 to 2 April 2011. There was one child of the marriage, Mia born 1 February 2008. His parents, two brothers and one sister reside in United Kingdom.
14. The parties stated they met at a nightclub on 13 January 2012. They began a relationship two weeks later on 26 January 2012. A defacto relationship commenced on 24 February 2012 when they moved in together. The parties were married on 22 February 2015.
15. A temporary visa (Subclass 820) was granted on 2 December 2012.

16. On 18 January 2015 an online application for a subclass 801 was submitted. On 22 October 2015 the Department invited the applicant to provide further documentation to support her application for a Partner (Residence) visa (subclass 801). No additional information was received.
17. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate stated that the applicant had failed to provide within the prescribed period of time the requested information to the Department. He stated that at the time of decision he had no information before him which demonstrated that the parties continued to be in a spousal relationship.
18. Prior to the hearing the applicant provided documents to the Tribunal including but not limited to the following;
- marriage certificate for the visa applicant and the sponsor stating they married on 22 February 2015,
 - statutory declarations from Melanie Clarke, Silvio Miceli and Jennifer Seifert,
 - water rate notices in name of visa applicant and her sponsor for period from 31 August 2016 to 2 December 2016,
 - residential tenancy agreement in names of visa applicant and her sponsor for period from 22 January 2016 to 19 January 2017,
 - residential tenancy agreement for period from 10 January 2017 to 9 January 2019 in names of visa applicant and her sponsor,
 - electricity accounts in name of visa applicant and her sponsor for period from 19 March 2016 to 17 June 2016, 18 June 2016 to 14 September 2016, 15 September 2016 to 14 December 2016,
 - statement dated 30 January 2017 from the visa applicant,
 - statement dated 23 January 2017 from the sponsor,
 - letter dated 25 January 2017 from Arnold Stevens Finlay, Chartered Accountants re the visa applicant's role in the company Signs Unique Installations Pty Ltd,
 - confirmation of reservation at Daydream Island in the name of the visa applicant for 2 adults and one child.
19. After the hearing the applicant submitted bank statements for an account held in both the name of the applicant and the sponsor for the period from April 2015 to January 2017.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in the present case is whether the applicant and her sponsoring spouse continue to be in a genuine spousal relationship.
21. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing by the applicant and her sponsor.

22. The parties gave consistent and coherent oral evidence about the circumstances in which they met the development of their relationship and their current living arrangements. The Tribunal found them to be credible and was satisfied it could rely on their evidence in making findings of fact.
23. The Tribunal accepts the parties' oral evidence that they met at Palms Nightclub following an online introduction on 13 January 2012. They began a relationship within weeks. The visa applicant and the sponsor moved in to live together on 24 February 2012 and they have lived together at various locations since that time. The parties were married on 22 February 2015. The parties have two children together, Mia the daughter from the sponsor's first marriage and their unborn son who is due to be born in April 2017.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

24. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen (Certificate of Sponsorship provided showing sponsor became an Australian citizen on 23 November 2011) and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
25. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

26. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage in Sydney on 22 February 2015, and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the marriage between the parties is a valid marriage for the purposes of the Act, as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

27. The applicant and the sponsor have an account in both names into which their earnings are paid. Statements for those accounts were provided to the Tribunal for the period from April 2015 to January 2017. The statements show regular household expenditure in terms of food, petrol, costs associated with the sponsor's daughter and other everyday costs were paid from that account as well as the payment of rent and utility bills. The parties gave consistent evidence that the sponsor manages their financial affairs and that she and the sponsor have a credit card in their name which she also uses for daily expenses for the family. The Tribunal was satisfied from the bank statements that money

from the account in both their names was used to pay the credit card accounts. The visa applicant manages all the financials for the sponsor's business and she draws an income from that company.

28. The applicant gave oral evidence and provided documentary evidence that they have in joint names leased two properties at Mona Vale and more recently at Frenchs Forest. The Tribunal accepts they resided together prior to that as well. The utilities are in both names and the accounts are paid from their joint account.

29. The Tribunal accepts from the evidence of the party and the bank records provided that the parties pool their financial resources and share household expenditure. The Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine spousal relationship.

30. *Nature of the household*

31. The Tribunal accepts the parties have lived together since they began a de facto relationship soon after they met in February 2012. They are currently living in a property at Frenchs Forest and pay rent of \$1250 per week.

32. The sponsor has shared custody of his daughter Mia from his first marriage. During the periods Mia is with them both the sponsor and the visa applicant provide care to her. The visa applicant coordinates her schedule of extracurricular activities such as swimming and music.

33. The parties provided consistent and convincing evidence regarding the arrangements for their household. The visa applicant is responsible for the majority of the household chores but the sponsor assists when he is able. The visa applicant does most of the cooking but both parties do the grocery shopping. The arrangement of the chores is mainly determined by their work schedules.

34. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.

35. *Social aspects of the relationship.*

36. The parties provided a number of statutory declarations from friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.

37. As noted above the Tribunal found the oral evidence provided by the parties to be clear and persuasive evidence that the parties have been in a loving couple relationship for many years and that they provide one another with considerable support.

38. The parties provided documentary evidence to support their oral evidence at the hearing that they have been on numerous holidays together since their marriage. Most recently they holidayed at Daydream Island with the daughter of the sponsor. They provided photographic evidence of their enjoying short trips and of frequently dining out.

39. On the basis of the oral evidence of the parties and the evidence provided by way of photographs the Tribunal finds that the relationship between the visa applicant and her sponsor is recognised and supported by their family and friends. They gave oral evidence of both families coming from overseas for visits and staying with them. The Tribunal is satisfied that the parties represent themselves as being married to one another to their family, friends and the wider community.

40. *Nature of the person's commitment to each other.*

41. The Tribunal finds that the visa applicant and his sponsor have been in a committed relationship since they began their defacto relationship in February 2012. They have lived together continuously since 2012 and married in February 2015.
42. The Tribunal has taken into account the evidence that the parties are expecting their first child together in April 2017. The decision to have a family together indicates a significant commitment to the relationship by both the visa applicant and her sponsor. The visa applicant gave evidence at the hearing of their excitement and of their plans to add to their family. It was readily apparent that Mia is a significant part of their family and both parties were committed to ensuring she was an integral part of their family plans. Their evidence of the stresses on the sponsor because of the time demands of his trying to build up a successful business that would generate sufficient income for them to buy a family home was credible and consistent.
43. The Tribunal has had the advantage of being able to observe the parties together at the hearing. Their emotional support for each other and companionship was readily apparent. They presented as a couple who loved and respected each other and who were devoted to Mia and their unborn child.
44. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future plans was consistent. The Tribunal was satisfied that the visa applicant and her partner were committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuous relationship.
45. **CONCLUSION**
46. The visa applicant openly told the Tribunal that she had omitted to provide the required paperwork to the Department because she had not received the email. She had changed emails and had not thought to notify the Department as they usually contacted her either by mail or by phone. She had not received a phone call. She had had the same phone number for a very long time.
47. The Tribunal has had the benefit of receiving oral evidence in person from the parties as well as seeing the parties interact with each other. It has also received a considerable amount of additional information such as bank statements and evidence that was not before the delegate.
48. Given these findings the Tribunal is satisfied that at the time of this decision the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.
49. Accordingly the Tribunal finds that the applicant satisfies the definition of spouse in s. 5F(2)(a)-(d) and the parties are in a spousal relationship. Therefore the applicant meets cl.801.221(2)(c).
50. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

51. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations.

52.

Moirá Brophy
Member

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).